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Sugumaran a/l Kannan v Public Prosecutor

B HIGH COURT (MUAR) — CRIMINAL APPEAL NO 42–24 OF 2006
JEFFREY TAN J
24 NOVEMBER 2006

C *Criminal Procedure — Sentence — Assessment of sentence — Whether trial court had considered all factors — Plea of guilt was entered on the very first day — Whether the extent of injury caused to be taken into consideration — Whether high incidence of a particular offence in the district to be taken into consideration*

D In the court below, the appellant pleaded guilty to an offence under s 394 read with s 34 of the Penal Code. This is the appellant's appeal against the sentence of 10 years imprisonment and six strokes of the cane. The appellant argued his own appeal. He was 44 and had worked as a lorry driver. His wife helped out as a laundry worker. He had four children of ages 12, 7, 5 and 4 and a paraplegic mother. He had kidney problems. He committed the offence whilst he was on drugs. Saying he would not E take drugs again, the appellant pleaded for a shorter term of imprisonment. The court below listed out six factors for the term of imprisonment: (i) the plea of guilt; (ii) court's discretion to determine the extent of a sentence; (iii) robbery being a serious offence; (iv) the appellant had a long criminal record; (v) 10 year sentences were affirmed in *Ahmad Zaini bin Mohd Salleh v PR* [2002] 1 LNS 37 and in F Malacca Criminal Appeal No 42–15 of 1995 for offences under s 394 of the Penal Code; and (vi) high incidence of robbery in that district.

Held, allowing the appeal:

G (1) The court below had not considered all factors. To begin with, it was not appreciated that the plea of guilt was entered on the very first day that the appellant was produced in court and that the injury caused to the victim was only superficial, and not at all life threatening. The court below let passed two factors that, if considered, could not have influenced the term of imprisonment H to the detriment of the appellant. There was also a failure to consider the personal circumstances of the appellant (which should have been reduced from the appellant who was not represented by counsel and would have known how to put his case in the best light), that again, if only considered, could not have influenced the term of imprisonment to the detriment of the appellant but in all probability would have evoked the sympathy of the court below, in spite of I the poor antecedents of the appellant (see para 11).

(2) It was not right to follow the sentences in *Ahmad Zaini bin Mohd Salleh v PR* and Malacca Criminal Appeal No 42–15 of 1995 without any consideration for the facts. The injury in the instant case was superficial and not at all life threatening, but the injury in Ahmad Zaini bin Mohd Salleh was a 3 cm long

stab wound above the stomach, a much more serious injury than the injury caused by the appellant. The facts were different and the degree of deliberation was different. The sentences in *Ahmad Zaini bin Mohd Salleh v PR* and in Malacca Criminal Appeal No 42–15 of 1995 were not the only precedents on sentences for a s 394 offence (see para 12).

(3) Each sentence must be individually assessed. It was just not fair to point to a similar term of imprisonment in a different case to justify the sentence. It was also not fair to hold the high incidence of robbery as a factor against the appellant. Suffice it to say, that the appellant could only be punished for his own wrong. The term of imprisonment is hereby reduced to seven years (see paras 12, 14).

[Bahasa Malaysia summary

Di mahkamah di bawah, perayu mengaku bersalah terhadap kesalahan di bawah s 394 dibaca dengan s 34 Kanun Keseksaan. Ini adalah rayuan perayu terhadap hukuman penjara selama 10 tahun dan 6 kali sebatan rotan. Perayu mewakili dirinya sendiri. Beliau berumur 44 tahun dan telah bekerja sebagai pemandu lori. Isteri beliau bekerja sebagai pekerja pembasuh. Beliau mempunyai empat orang anak dari tahun 12, 7, 5 & 4 dan seorang ibu paraplegik. Beliau mempunyai masalah buah pinggang. Beliau telah melakukan jenayah tersebut ketika dipengaruhi dadah. Beliau menyatakan bahawa ia tidak akan mengambil dadah lagi, dan menyeru untuk satu hukuman penjara yang lebih singkat. Mahkamah di bawah menyenaraikan enam faktor-faktor untuk hukuman penjara tersebut: (i) pengakuan bersalah; (ii) budi bicara mahkamah dalam menentukan had pemenjaraan; (iii) kegiatan merompak merupakan kesalahan yang serius; (iv) perayu mempunyai rekod jenayah yang lampau; (v) 10 tahun pemenjaraan disokong di dalam kes *Ahmad Zaini bin Mohd Salleh v PR* [2002] 1 LNS 37 dan dalam Rayuan Jenayah Melaka No 42–15 tahun 1995 untuk kesalahan-kesalahan di bawah s 394 Kanun Keseksaan; dan (vi) kejadian rompakan yang tinggi di kawasan tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Mahkamah di bawah tidak mengambil kira kesemua faktor-faktor. Ia tidak mengambil kira bahawa pengakuan salah dimasukkan pada hari yang pertama perayu dihadapkan di mahkamah dan kecederaan yang dikenakan ke atas mangsa adalah kecederaan ringan, dan langsung tidak mengancam nyawa. Mahkamah di bawah tidak mengambil dua faktor-faktor, yang, sekiranya diambil kira, tidak akan mempengaruhi tempoh pemenjaraan terhadap perayu. Terdapat juga kegagalan dalam mengambil kira keadaan-keadaan peribadi perayu (yang mana patut dikurangkan untuk perayu yang tidak diwakili oleh peguambela dan tidak tahu bagaimana untuk mewakilkan kesnya dalam keadaan yang terbaik sekali), dan ini, sekiranya diambil kira tidak akan mempengaruhi tempoh pemenjaraan terhadap perayu tetapi berkemungkinan akan menghasilkan simpati di mahkamah bawah, walaupun dengan rekod jenayah yang lampau (liaht perenggan 11).

(2) Ia adalah tidak betul untuk mengikuti hukuman-hukuman di dalam kes *Ahmad Zaini bin Mohd Salleh v PR* dan Rayuan Jenayah Melaka No 42–15 tahun 1995 tanpa sebarang pertimbangan terhadap fakta-fakta. Kecederaan di dalam kes ini adalah ringan dan langsung tidak mengancam nyawa sementara kecederaan di Ahmad Zaini bin Mohd Salleh adalah luka tikam sepanjang 3 sm di atas perut, satu kecederaan yang lebih serius daripada kecederaan yang disebabkan oleh perayu. Fakta-fakta adalah berlainan dan kadar pertimbangan berlainan. Hukuman di kes *Ahmad Zaini bin Mohd Salleh v PR* dan di Rayuan Jenayah Melaka No 42–15 tahun 1995 bukan sahaja duluan atas hukuman di bawah tuduhan s 394 (lihat perenggan 12).

(3) Setiap hukuman patut dinilai berasingan. Ia adalah tidak adil untuk merujuk kepada satu hukuman yang sama untuk satu kes yang berlainan untuk menjustifikasikan hukuman. Ia juga tidak adil untuk memutuskan bahawa kejadian rompakan yang tinggi di kawasan tersebut adalah satu faktor terhadap perayu. Apa yang perlu dinyatakan ialah perayu hanya boleh dihukum atas kesalahannya sendiri. Hukuman pemenjaraan dengan ini dikurangkan kepada tujuh tahun (lihat perenggan 12, 14).]

Notes

For cases on assessment of sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3197–3203.

Cases referred to

Abdul Rahman bin Ibrahim v The Public Prosecutor of Johore [1938] MLJ 219 (refd)
Ahmad Zaini bin Mohd Salleh v PR [2002] 1 LNS 37 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83 (refd)
DPP v Mohamed Nor & Ors [1985] 2 MLJ 200 (refd)
Fairus Nizam bin Shueb v PP [2001] 5 MLJ 224 (refd)
Joginder Singh v PP [1984] 2 MLJ 133 (refd)
Lee Peng Kong v PP [1986] 2 CLJ 139 (refd)
Lee Yoke Choong v PP [1964] MLJ 138 (refd)
Liow Chow & Anor v PP [1939] MLJ 170 (refd)
Low Oi Lin v R [1949] MLJ 210 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Mohamed Jusoh bin Abdullah & Anor v PP [1947] MLJ 130 (refd)
PP v Fam Kim Hock [1957] MLJ 20 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Khairuddin [1982] 1 MLJ 331 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohd Nooh bin Yusof & Ors 5 Mallal's Digest (4th Ed, 1997 Reissue) para 2918 (refd)
PR v Adam bin Mohamad 5 Mallal's Digest (4th Ed,1997 Reissue) para 2908 (refd)
R v Kenneth John Ball 35 Cr App R 164 (refd)
R v Murukaivan Rasoo [1957] MLJ 26 (refd)
R v WN Hammar [1958] MLJ 4 (refd)
Rex v Leo De Cruz [1935] MLJ 1 (refd)
Yap Teng Chai v PP [1959] MLJ 205 (refd)

Legislation referred to
Penal Code ss 34, 325, 326, 394

Appeal from: Criminal Trial No 62–35 of 2005 (Sessions Court, Batu Pahat)

Appellant in person.
Nur Irmawatie bte Daud (Attorney-General's Chambers) for the respondent.

Jeffrey Tan J:

[1] In the court below, the appellant pleaded guilty to the following offence:

> Bahawa kamu bersama-sama rakan yang masih bebas pada jam lebih kurang 12.45 pagi, 5 Ogos 2005 di dalam kilang Teat Leng Industrial, Simpang Renggam, Dalam Daerah Kluang, Dalam Negeri Johor, telah didapati menggunakan kekerasan jenayah dengan mendatangkan cedera menggunakan sebilah pisau ke atas penama Mahdi bin Suratin semasa melakukan perbuatan samun. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 394 Kanun Keseksaan di baca bersama di bawah s 34 Kanun Keseksaan.

[2] This is the appellant's appeal against the sentence of 10 years imprisonment and six strokes of the cane that the trial court handed down on 12 August 2006.

[3] The appellant argued his own appeal and said as follows. He was 44 and had worked as a lorry driver. His wife helped out as a laundry worker. He had four children of ages 12, 7, 5 and 4 and a paraplegic mother. He had kidney problems. He committed the offence whilst he was on drugs — 'ambil dadah sebab buat itu'. Saying he would not take drugs again, the appellant pleaded for a shorter term of imprisonment. The learned Deputy Public Prosecutor, Nur Irmawatie bte Daud, pointed to the long record of the appellant and said that sentence should be affirmed.

[4] 'In deciding the appropriate sentence... the first and foremost consideration is the public interest' (*R v Kenneth John Ball* 35 Cr App R 164; see also *R v Murukaivan Rasoo* [1957] MLJ 26). 'If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law. A sentence according to law means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles' (*Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315 at p 316, per Mohamed Azmi J (as he then was)). 'The first and foremost consideration of punishment is the public interest. [Because] the object of punishing crime is... also to deter others' (*Yap Teng Chai v Public Prosecutor* [1959] MLJ 205 at p 206; see also *Reg v WN Hammar* [1958] MLJ 4). Nonetheless, in assessing sentence all the circumstances of the offence should be considered (*Low Oi Lin v R* [1949] MLJ 210). 'The court in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received if the crime is one of violence, the antecedents of the prisoner up to the time of the sentence, his age and character' (*Mohamed Jusoh bin Abdullah & Anor v*

Public Prosecutor [1947] MLJ 13, citing *Halsbury's Laws of England* (Hailsam Ed) Vol 9 para 365). 'Courts are duty bound to consider all these matters before deciding upon a suitable sentence' (*Joginder Singh v Public Prosecutor* [1984] 2 MLJ 133, per Ajaib Singh J as he then was). The sentence must be one appropriate to the gravity' of the offence (*Lee Yoke Choong v Public Prosecutor* [1964] MLJ 138). Accordingly, the sentence should reflect the seriousness of the offence (*Public Prosecutor v Khairuddin* [1982] 1 MLJ 331). Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence (*Lee Peng Kong v Public Prosecutor* [1986] 2 CLJ 139). That is not to say though, that 'the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives' (*R v Murukaiyan Rasoo*). Public interest must not be relegated to the background. 'The correct approach is to strike a balance, so far as possible, between the interest of the public and the interest of the accused' (*Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at p 258, per Hashim Yeop Sani J, as he then was; see also *PR v Adam bin Mohamad* 5 Mallal's Digest (4th Ed, 1997 Reissue) para 2908 and *Public Prosecutor v Mohd Nooh bin Yusof & Ors* 5 Mallal's Digest, para 2918, 'A court has the discretion to be lenient and merciful provided there are extenuating circumstances and it is in the public interest to do so' (*Public Prosecutor v Khairuddin*).

[5] In an appeal on sentence, 'it is an established principle that the sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances' (*Public Prosecutor v Fam Kim Hock* [1957] MLJ 20; see also *Liow Chow & Anor v Public Prosecutor* [1939] MLJ 170), manifestly excessive or inadequate (see *Abdul Rahman bin Ibrahim v The Public Prosecutor of Johore* [1938] MLJ 219), or 'unless the [subordinate court had] proceeded on wrong principles or given undue weight to some of the evidence' (*Rex v Leo De Cruz* [1935] MLJ 1), or that in fixing the sentence the subordinate court had failed to adequately consider all the relevant factors either for or against the offender (*Joginder Singh v Public Prosecutor* [1984] 2 MLJ 133).

[6] 'It is [also] an established principle that an appellate court should be slow to interfere with or disturb a sentence passed by the court below... the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence' (*DPP v Mohamed Nor & Ors* [1985] 2 MLJ 200, per Abdul Hamid CJ (Malaya) as he then was). 'The High Court sitting in exercise of its [appellate] powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence, having regard to all the facts disclosed on the record or that the lower court clearly has erred in applying the correct principles in the assessment of the sentence passed' (*Public Prosecutor v Loo Choon Fatt*).

Civil and Criminal Appeals in Malaysia by Tan Kee Heng at pp 191–192, summarised the position as follows:

> ... the appellate court is ready to interfere with the sentence imposed by the trial court upon proof of one or more of the following circumstances: (a) The sentence imposed by the trial court was manifestly excessive or inadequate; (b) There is a manifest error either in law or

in considering the facts and circumstances of the case; (c) The sentence passed by the trial court is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances; (d) The trial court has given undue weight to some of the evidence; (e) The trial court, in fixing the sentence, had failed to adequately consider all the relevant factors either for or against the offender; (f) The sentence was wrong in law; (g) The unsatisfactory features of the proceedings in the lower court (h) The charge has been hanging over the accused's head for a considerable period, (i) Justice does not appear to have been done.

[7] The Federal Court per Raja Azlan Shah Ag LP (as HRH then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, at p 84, imparted the following guide:

Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient per se to warrant this court's interference.

[8] In its grounds of judgment, the court below listed out six factors for the term of imprisonment, which were: (i) the plea of guilt was a mitigating factor for a lighter sentence; (ii) the discretion to determine the extent of a sentence in a particular case lies with the court; (iii) robbery is a serious offence deserving of a deterrent sentence; (iv) the appellant had a long criminal record; (v) 10 year sentences were affirmed in *Ahmad Zaini bin Mohd Salleh v PR* [2002] 1 LNS 37 and in Malacca Criminal Appeal No 42–15 of 1995 for offences under s 394 of the Penal Code; and (vi) there was a high incidence of robbery in the District of Kluang and in the State of Johore, and one factor, namely, injury was caused to the victim and the cane had not deterred the appellant from his criminal ways, for the imposition of the cane.

[9] First, let it be said that the appellant richly deserved a long custodial sentence and the imposition of the cane. A person who causes hurt in committing or in attempting to commit robbery commits a serious offence. Recognising so, 394 stipulates that the offender 'shall be punished' with imprisonment for a term which may extend to 20 years and shall also be liable to fine and or to whipping. Imprisonment is mandatory. There was no need for the court below to stress on the seriousness of the offence or justify imprisonment. Rather, in relation to imprisonment, it was only the extent of the term of imprisonment that was pertinent.

A Of course, the discretion to assess and fix the term of imprisonment laid with the court below, but that discretion must be exercised judicially (see *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, which was cited by the court below).

B **[10]** But the court below had not considered all factors. To begin with, it was not appreciated that the plea of guilt was entered on the very first day that the appellant was produced in court and that the injury caused to the victim was only superficial, and not at all life threatening (see p 25 of the appeal record). The court below let passed two factors that, if considered, could not have influenced the term of C imprisonment to the detriment of the appellant. There was also a failure to consider the personal circumstances of the appellant (which should have been educed from the appellant who was not represented by counsel and would have known how to put his case in the best light), that again, if only considered, could not have influenced the term of imprisonment to the detriment of the appellant but in all probability would D have evoked the sympathy of the court below, in spite of the poor antecedents of the appellant.

[11] The court below also erred on the so called factors that it said it had considered before it passed the sentence — 'Sebelum menjatuhkan hukuman, E Mahkamah ini menimbangkan beberapa factor antaranya ialah'. It was correctly held that the plea of guilt was a mitigating factor for a lighter sentence. But it was incorrectly held that the discretion of the court to determine the extent of the sentence, which only goes to the plenary power of the court, was a factor in the assessment of the sentence. It was correctly observed that robbery is a serious offence and that the appellant was an unreformed recidivist. But it was not right to follow F the sentences in *Ahmad Zaini bin Mohd Salleh v PR* and Malacca Criminal Appeal No 42–15 of 1995 without any consideration for the facts. As said, the injury in the instant case was superficial and not at all life threatening, but the injury in *Ahmad Zaini bin Mohd Salleh* was a 3 cm long stab wound above the stomach, a much more serious injury than the injury caused by the appellant. The facts were different and the degree of deliberation was different. Yes, the sentences in *Ahmad Zaini bin Mohd* G *Salleh v PR* and in Malacca Criminal Appeal No 42–15 of 1995 were pointers. But those sentences were not the only precedents on sentences for a s 394 offence. In *Fairus Nizam bin Shueb v Public Prosecutor* [2001] 5 MLJ 224, the appellant was charged under ss 394 and 326 of the Penal Code. Permanent injuries/scarring were caused to the victim with a knife. The trial court judge reduced the second charge H and convicted the appellant under s 325. The appellant was sentenced to 18 months imprisonment. On appeal, PS Gill J (as he then was), allowed the prosecutor's appeal against acquittal under s 394, dismissed the cross appeal by the appellant, and enhanced the sentence to five years imprisonment, notwithstanding the fact that the appellant had contested the charge to the very end. The point is that there will be I sentences at both the lower and higher end of the range of sentences for any one given offence, and precedents on sentences only serve as guides on the norm. Ultimately, it remains, that each sentence must be individually assessed. It was just not fair to point to a similar term of imprisonment in a different case to justify the sentence. It was also not fair to hold the high incidence of robbery as a factor against the appellant. Suffice it to say, that the appellant could only be punished for his own wrong.

[12] In truth, there were only two aggravating factors against the appellant, namely: (i) that the appellant committed a serious offence, and (ii) that the appellant was an unreformed recidivist. No question about it, the appellant should be imprisoned for a term that would have to take into account his poor antecedents. On the other hand, there was the mitigating factor of the almost instantaneous plea of guilt, and the personal circumstances that cried out for sympathy and mercy. All things considered, a sentence of 10 years imprisonment could only come across as manifestly harsh and insensitive. In any event, there was a failure to adequately consider all the factors, and there were manifest errors in the so called factors against the appellant. There is reason enough to interfere with the sentence.

[13] In allowing this appeal for the above reasons, the term of imprisonment is hereby reduced to seven years; otherwise, all other orders and or directions of the court below remain unaffected.

Appeal allowed.

Reported by Sally Kee